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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. [redacted] 29

NORWICH UNION FIRE INSURANCE SOCIETY, LTD., PETITIONER AND APPELLANT BELOW,

vs.

J. M. SCOTT, RESPONDENT AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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(35,702)

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SUPREME COURT OF THE UNITED STATES.

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No. 780

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vs.

J. M. SCOTT, RESPONDENT AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

This is one of five cases at law commenced by the respondent, the plaintiff below, against your petitioner,

the defendant below, and four other insurance companies, which were brought in the State Court of Ohio and removed to the United States District Court for Southern Ohio upon the ground of diversity of citizenship, where the five cases were consolidated by order of the District Court. Two of these five cases, in which the New York Underwriters Insurance Company and the Westchester Fire Insurance Company were defendants below, terminated in judgments by the United States Circuit Court of Appeals, Sixth Circuit, reversing the judgments of the District Court, which had been in favor of the plaintiff below, and are therefore not here for consideration. There was but one opinion rendered by the Circuit Court of Appeals in passing upon the merits of all five of the cases.

Identical petitions for writs of certiorari and identical briefs in support thereof are now filed in this Court by the defendants below, Sun Insurance Office, Norwich Union Fire Insurance Society, Ltd., and The Home Insurance Company, against each of which judgments were rendered by the District Court (R. 45), and affirmed by the United States Circuit Court of Appeals, Sixth Circuit (R. 248), by a divided court.

Each of these suits sought a recovery upon a policy of fire insurance issued upon wool, including woolen bags, belonging to plaintiff. To each of them the defense was made that plaintiff placed a chattel mortgage on the property in violation of a provision in the policies as follows (R. 34, 35): "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest

of the insured be other than unconditional and sole ownership, * * * or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage." In each of the policies there was the further provision (Sun Insurance Office, R. 132, 133, Exhibit 4; Norwich Union Fire Ins. Soc., R. 135, Exhibit 5; Home Ins. Co., R. 104, 105, Exhibit 1) that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto." The latter provision was relied upon by defendants in response to plaintiff's claim that there was a waiver of the former.

It was admitted in the pleading (R. 21, 28) and established without dispute (R. 58) that on June 19, 1926, the plaintiff executed a chattel mortgage on the property to the Cumberland Savings Bank Company, and that this chattel mortgage was subsisting with the principal unreduced at the time of the fire.

Endorsed upon the policy in suit was the following loss-payable clause (Sun Ins. Office R. 127) (Norwich Union Fire Ins. Soc. R. 13[illegible] (Home Ins. Co. R. 104):

"Loss Payable Clause.

"Any loss under this policy that may be proved due shall be payable to the assured and

The Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy."

The question involved in view of the foregoing is whether, as held by the majority opinion of the Court of Appeals, this loss-payable clause, which neither mentioned a chattel mortgage nor described the payee therein as chattel mortgagee nor recognized any property right in such payee in the property insured, constituted a written waiver of the prohibited chattel mortgage.

The policy in suit further provided (Sun Insurance Office R. 131) (Norwich Union Fire Insurance Society R. 140) (Home Insurance Company R. 109) that, in the event of disagreement as to the amount of loss, the same should be ascertained by appraisers, the insurance company and the insured each selecting an appraiser and the two so chosen to select an umpire, and that the award in writing of any two should determine the amount of such loss.

The policy further provided (Sun Ins. Office R. 132) (Norwich Union Fire Insurance Society R. 140) (Home Insurance Company R. 110) that no suit or action on the policy for the recovery of any claim should be sustainable in any court of law or equity until after full compliance by the insured with all the above requirements, and that the loss should not become payable until sixty days after such ascertainment, including an award by appraisers (R. pages 109-110).

After the fire and before any communications whatever were had by the insurance company, or any rep-

resentative thereof, with the plaintiff below, a written non-waiver agreement was signed and entered into by and between the parties (R. 141, 142), which provided, in part, as follows:

> "It is hereby mutually stipulated and agreed that any action taken by the insurance company or companies, signing this agreement, in ascertaining the amount of loss and damage which occurred September 6, 1926 to property located in rear lot W/S of Cambridge St. Cumberland, Ohio, and in investigating the cause thereof, shall not waive or invalidate any of the conditions of the policies of insurance, and shall not waive or invalidate any rights whatever of any party to this agreement.
>
> "Notice is hereby given and accepted, and it it hereby mutually understood and agreed, that no representative of any insurance company signing this agreement has power or authority to waive any of the conditions of their respective policies, unless such waiver be specifically made in writing."

After sworn proofs of loss, in which the plaintiff set forth his claim as to the amount of loss, were furnished by the plaintiff below to the defendant insurance company (Sun Insurance Office R. 175, Exhibit 17) (Norwich Union Fire Insurance Society R. 187, Exhibit 18) (Home Insurance Company R. 142, Exhibit 14), and the defendant insurance company advised the plaintiff below in writing that the defendant insurance company disagreed with the plaintiff below as to the amount of the loss caused by the fire in question, as stated in his proof of loss (Exhibit 19, Home

Insurance Company R. 198, (Exhibit 22, Sun Insurance Office R. 202) (Exhibit 23, Norwich Union Fire Insurance Society, Ltd., R. 203), then, without further communication, oral or written, between the parties, the plaintiff below commenced the present suit without obtaining an award of appraisers fixing the amount of the loss, or making any demand or request therefor. The disagreement between the parties as to the amount of loss and plaintiff's failure to obtain an award of appraisers as to the amount of the loss were alleged by the defendant below in its answer (R. p. 34).

In the face of these undisputed facts, and in spite of the rule settled by the Supreme Court of Ohio and binding upon the Federal courts, that such disagreement as to the amount of loss made the procurement by the insured of an award of appraisers fixing the amount of the loss a condition precedent to any right of action, the District Court held (R. pp. 94, 95) that no obligation rested upon the insured, plaintiff below, to obtain an award of appraisers as a condition precedent to a right of action on the policy. The United States Circuit Court of Appeals, on the other hand, in its majority opinion, while recognizing that an award of appraisers was a condition precedent to a right of action, held that the performance of such condition precedent by the plaintiff below had been waived, because, as the Circuit Court of Appeals said in its opinion, "the defendant denied liability before suit was brought and after it was brought" (R. 229).

There is no evidence whatever in the record of any denial of liability by the insurance company prior to

the commencement of suit, and the only action taken by the defendant insurance company after commencement of suit was its action in filing its answer, in which it pleaded two defenses, as permitted by the statutes of Ohio: (1) The defense of failure by the plaintiff below to perform the condition precedent of the contract as to appraisal, and (2) the further consistent defense of incumbrance of the property by chattel mortgage, in violation of the terms of the policy.

Another question involved, in view of the foregoing, is whether, as held by the majority of the Court of Appeals, an insurance company whose only dealings with the insured after a loss are under a non-waiver agreement, and whose only communication with the insured consisted of a written disagreement with the insured as to the amount of the loss without in any way denying liability, and whose only action after suit is brought is the filing of an answer setting up two consistent defenses (as here, failure to obtain an award of appraisers and violation of the condition prohibiting incumbrance by chattel mortgage), can be deemed to have waived, or held to be estopped to set up, the insured's non-performance of the appraisal condition.

The trial in the United States District Court was by jury and a verdict and judgment by direction of the District Court were rendered in favor of the respondent, J. M. Scott, and against the petitioner herein, Norwich Union Fire Insurance Society, Ltd., for $6,412.50, which included interest from the date of the fire (R. 45). An appeal from said judgment was taken by the petitioner herein, Norwich Union Fire Insurance So-

ciety, Ltd., to the United States Circuit Court of Appeals, Sixth Circuit (R. 206 to 222), which affirmed the judgment of the United States District Court (R. 248) by a divided court (see dissenting opinion of Judge Killetts, R. 230-245) after a certified copy of a remittitur of the interest from the date of the fire, September 6, 1926, until December 4, 1926, had been filed (R. 246, 247) in accordance with the order of the United States Circuit Court of Appeals (R. 224). A petition for rehearing was filed in the United States Circuit Court of Appeals by your petitioner herein on January 9, 1931 (R. 249), and was denied, Judge Killetts dissenting, on February 10, 1931 (R. 261).

II.

Reasons Relied Upon for Allowance of the Writ.

A.

The majority decision of said Circuit Court of Appeals in holding that the appointment of a creditor to receive the proceeds of a fire-insurance policy by written endorsement on the policy of a loss-payable clause, which by its terms is expressly made subject to all the conditions of the policy, is a written waiver of a condition of the policy prohibiting chattel mortgage, is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit on the same matter in the case of

Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497 (opinion by Judge Van Devanter).

B.

The majority decision of said Circuit Court of Appeals as to the effect of the loss-payable clause attached to the policy in suit, by holding that such loss-payable clause—though by its express terms it was "subject to all the terms and conditions of the policy", and though such loss clause contained no reference to chattel mortgage and no description of the payee as chattel mortgagee or as having any interest whatever in the property—is nevertheless a written waiver of the condition in the policy prohibiting incumbrance by chattel mortgage, there being no pleading or proof of a course of dealing between the parties or of usage and custom qualifying the unambiguous language used, has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; including the decision by this Court in

Bates vs. Equitable Insurance Co., 10 Wall. 33.
Atlas Reduction Co. vs. New Zealand Ins. Co., 138 Fed. 497.

C.

The majority decision of said Circuit Court of Appeals in considering and basing its decision upon a custom, when not pleaded or in evidence, and ingrafting a meaning into a contract by construction based upon such assumed, unpleaded and unproven custom, where the written contract is clear and unambiguous and not open to construction (Majority Opinion, R. 227-228), has decided an important question of general law in a way probably untenable or in conflict with the weight

of authority and has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

Bates vs. Equitable Insurance Company, 10 Wall. 33.

D.

The majority decision of said Circuit Court of Appeals while professing to hold, in accordance with the law as settled by this Court, that knowledge of the insurer's agent, not communicated to his principal, of the prohibited incumbrance by chattel mortgage may not be imputed to the insurer to effect a waiver or estoppel under the form of insurance contract here involved, has, nevertheless, in its opinion, in fact given effect to evidence of such claimed knowledge by the agent in deciding that "the purpose in attaching the loss-payable clause was to grant authority to incumber the property", and in holding that "the indorsements were made with full knowledge of the facts and were intended to authorize the encumbering of the property by chattel mortgage" (R. 228). Such decision by the majority of the Circuit Court of Appeals is an erroneous decision of an important question of general law, and a decision in conflict with the law as settled by this Court on the question.

Northern Assurance Company vs. Grand View Building Association, 183 United States Reports, 308.

Lumber Underwriters vs. Rife, 237 United States Reports, 605, 609.

Penman vs. St. Paul Fire & Marine Insurance Company, 216 United States Reports, 311 (1910), Syl, and pp. 321-322.

Mutual Life Insurance Co. vs. Hilton Green, 241 United States Reports, 613, 624 (1916).

Ætna Life Insurance Company vs. Moore, 231 United States Reports, 543, 559 (1913).

Prudential Insurance Company vs. Moore, 231 United States Reports, 560—Syl. 3 (1913).

E.

The majority decision of said Circuit Court of Appeals in holding that an insurance company, which simply disagrees with the insured's claim as to the amount of the loss without denying liability prior to suit, and which, subsequent to suit, merely files an answer alleging the defense of failure by the insured to perform the condition precedent as to appraisal of the amount of loss and alleging further a defense of incumbrance by chattel mortgage in violation of the terms of the policy, has thereby waived performance by the insured of the appraisal condition precedent of the policy, is a decision of an important question of local law in a way probably in conflict with applicable local decisions.

Insurance Company vs. Carnahan, 63 Ohio State, 258, Syllabi 5 and 7.

Graham vs. Insurance Co., 75 Ohio State, 374.

Edward Everett Co. v. Great American Insurance Company, 9 Ohio *nisi prius* Reports (new series), 241 (affirmed 81 Ohio State, 573).

Fire Association vs. Agresta, 115 Ohio State, 426, 430.

Orenstein vs. Star Insurance Co. of America, 10 Federal (2nd), 754.

F.

The great importance to the business world and the insuring public, as well as the legal profession, and the need of an authoritative and elucidating decision by this Court as to the legal and operative effect of a loss-payable clause of the form here involved, calls for a review and final determination of this case by this Court, particularly in view of the direct and irreconcilable conflict of opinion between the various Circuit Courts of Appeal and the judges of the United States Circuit Court of Appeals in this case.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record of the proceedings of the said United States Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its docket No. 5279, Norwich Union Fire Insurance Society, Ltd., appellant, *vs.* J. M. Scott, appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of said United States Circuit Court of Appeals for the Sixth Circuit

be reversed by this Court, and that your petitioner may have such other and further relief as to this Honorable Court may seem meet, just and proper.

NORWICH UNION FIRE IN-
SURANCE SOCIETY, LTD.,
By ROLLAND M. EDMONDS,
Counsel for Petitioner.